SOUTHERN REALTY (MALAYA) SDN BHD v. PENTADBIR TANAH DAERAH DAN PEJABAT TANAH SEPANG & ANOR

HIGH COURT MALAYA, SHAH ALAM
MOHD FIRUZ JAFFRIL J
[ORIGINATING SUMMONS NO: BA-24-43-10-2020]
27 SEPTEMBER 2022

Abstract – *The terms of a consent order entered into between parties do not prevent a plaintiff from claiming late payment charges – even if the compensation sum has been deposited in court.*

CIVIL PROCEDURE: *Judgments and order – Consent order – Parties entered into consent order for payment of judgment sum – Application for satisfaction of sums due – Compensation deposited into court – Whether ss. 32 and 43 of Land Acquisition Act 1960 applicable for purposes of claiming late payment charges of 8% – Whether application for certificate under s. 33 of Government Proceedings Act 1956 appropriate*

A consent order was recorded between the plaintiff and the first respondent, at the High Court, where it was agreed that: (i) the first defendant shall deposit RM737,000 together with interest accruing, amounting to RM757,595.62, in court; and (ii) payment to the plaintiff or the plaintiff's solicitor, with no order as to costs. Although partial payments had been made, they were wholly inadequate to satisfy what was legally due to the plaintiff; the defendants were still indebted to the plaintiff in the sum of RM669,164.74. The first defendant had, thus far, failed, refused and/or neglected to pay the said balance of the judgment sums or any part of the same to the plaintiff or the plaintiff's solicitor. Hence, the present application by the plaintiff, pursuant to O. 73 r. 12 of the Rules of Court 2012 ('ROC') and/or s. 33 of the Government Proceedings Act 1956 ('GPA') and the inherent jurisdiction of the court, for the satisfaction of the sums. Objecting to the application, the defendants raised the issues of: (i) whether ss. 32 and 43 of the Land Acquisition Act 1960 ('LAA') were applicable for purposes of claiming late payment charges of 8%, in view of the fact that the compensation sum was already deposited into court; and (ii) whether the plaintiff's application for a certificate under s. 33 of the GPA, claiming interest on late payment charges, and not compensation, was appropriate.

Held (allowing application):

(1) The plaintiff had shown that: (i) there was a perfected consent judgment between the plaintiff and the first defendant; (ii) the orders were made against the first defendant who was an officer of Government and was executing the official duties at all material times; and (iii) there were

recent part payments, reflecting the defendants' acknowledgment that further amounts were due and payable towards the judgment sum. (para 19)

(2) The plaintiff can claim late payment charges once the compensation sum is deposited in court and the terms of the consent order did not prevent the plaintiff from doing so. Based on s. 32 of the LAA, the plaintiff's entitlement to late payment charges was of right and immediate for any compensation. Section 32 of the LAA is wide to cover 'any compensation' awarded under the LAA. As the defendants had only made part payment from the judgment sum, (i) the late payment charges would be imposed as of right on the sum of RM476,529.95 and the balance judgment sum payable to the plaintiff; and (ii) the defendants' admission in having outstanding judgment sum. (paras 21, 22, 25 & 26)

(3) Given the fact that the defendants had dragged their feet in making payments, which the plaintiff was entitled to pursuant to the terms of the consent order, based on authorities, this court had the inherent jurisdiction to make the ancillary order as prayed for by the plaintiff. (para 38)

Case(s) referred to:

Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor [1997] 3 CLJ 885 HC ***(refd)***

Ann Joo Steel Bhd v. Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor And Another Appeal [2019] 9 CLJ 153 ***(refd)***

Arena Tegar Sdn Bhd v. Pentadbir Tanah Daerah Johor Bahru & Anor [2017] 9 CLJ 77 HC ***(refd)***

Ismail Bakar & Ors v. Director Of Lands And Mines, Kedah Darul Aman [2010] 9 CLJ 810 CA ***(refd)***

Phuah Beng Chooi & Ors v. Koh Heng Jin & Ors And Other Cases [2006] 8 CLJ 364 HC ***(refd)***

Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***

Stone World Sdn Bhd v. Engareh (M) Sdn Bhd [2020] 9 CLJ 358 FC ***(refd)***

Legislation referred to:

Government Proceedings Act 1956, ss. 2(1), 33(1)
Land Acquisition Act 1960, ss. 29A, 32(1)(c), 43
Rules of Court 2012, O. 20 r. 11, O. 73 r. 12, O. 92 r. 4

For the plaintiff - GK Ganesan, Samreet Singh Sagoo & GS Saran; M/s Lovelace & Hastings
For the defendants - Etty Eliany Tesno; Selangor State Legal Advisor

Reported by Najib Tamby

JUDGMENT

Mohd Firuz Jaffril J:

[1] The present originating summons ("OS") before me is the plaintiff's application pursuant to O. 73 r. 12 of the Rules of Court 2012 ("RC 2012") and/or s. 33 of the Government Proceedings Act 1956 ("GPA") and/or the inherent jurisdiction of this Honourable Court.

[2] The following are the orders sought by the plaintiff:

(i) a certificate (hereinafter 'certificate-1') under s. 33 of Government Proceedings Act 1956 be issued against the defendant and each of them for the payment to the plaintiff of:

(a) the sum of Ringgit Malaysia four hundred and seventy-six thousand five hundred and twenty-nine and ninety-five cents only (RM476,539.95) being the sum due to the plaintiff up until 30 September 2020;

(1) or such other sum as this Honourable Court deems fit and proper as being pursuant to the consent order dated 25 November 2014; and

(b) late payment charges at the rate of 8% per annum on the outstanding amount from 1 October 2020 until the date of full settlement; or

(1) the sum of RM104.23 being the late payment charges per day on the outstanding balance judgment sum from 1 October 2020 until the date of full settlement; or

(2) such other sum as this Honourable Court deems fit and proper pursuant to the consent order dated 25 November 2014 until the date of full and final settlement of all sums due from the defendants;

(ii) and the costs of this application; and an additional certificate be issued to the plaintiff against the defendants and each of them in this action under the proviso to s. 33(1) of the Government Proceedings Act 1956 for the payment of such costs to the plaintiff as attached in Annexure B to the application ('certificate 2').

(iii) any other relief deemed fit and necessary by this Honourable Court.

[3] On 27 June 2022, this court allowed the plaintiff's application in the following terms:

(i) a certificate-1 under s. 33 of Government Proceedings Act 1956 be issued against the defendant and each of them for the payment of the plaintiff of the sum of RM151,836.80;

(ii) costs of RM15,000; and

(iii) interest on cost at the rate of 5.0% per annum from the date of this award.

[4] The following are the grounds of judgment for the aforesaid decision.

Background Of The Applicant's Application

[5] On 25 November 2014, a consent order between the plaintiff and the first respondent was recorded before the High Court in Shah Alam (Originating Summons No: 24-1484-2011) in which that:

(i) the first defendant shall deposit RM737,000 together with all interest accruing amounting to RM757,595.62 in court; and

(ii) payment to the plaintiff or the plaintiff's solicitor, Messrs Lovelace & Hastings, with no order as to costs.

[6] On 13 October 2012, the first defendant paid a sum of RM737,000 as deposit in the court.

[7] On 17 February 2015, the first defendant paid a further sum of RM281,065.67 being part payment of the interest sum, leaving the balance of RM476,529.95 as at 25 November 2014.

[8] Although partial payments have been made, these are wholly inadequate to satisfy what is legally due to the plaintiff.

[9] Despite the payment of these sums, that the defendants are still indebted to the plaintiff in the sum of RM669,164.74 as at 30 September 2020. A breakdown of the indebted sum which is RM669,164.74 is as follows:

1.	Sum deposited in Court	RM737,000
2.	Late payment charges	RM281,065.67 (RM757,595.62)
3.	Balance owing to the Plaintiff	RM476,529.95
4.	Interest of 8% on late payment charges as at 30 September 2020 *(Note: the 8% is applicable as the award was made prior to amendment lowering the interest rate to 5%)*	**RM669,164.74**

[10] By letters dated 14 May 2018, 23 January 2020, 13 February 2020 and 21 May 2020 respectively, the plaintiff's solicitors demanded the first defendant to pay the balance of the judgment sums to the plaintiff or the plaintiff's solicitor.

[11] However, the first defendant has so far failed, refused and or neglected to payment the said balance of the judgment sums or any part thereof to the plaintiff or the plaintiff's solicitor.

[12] For these reasons, the plaintiff desires the satisfaction of the sums prayed for certification to be first, certified and second, upon certification, be paid to the plaintiff or its solicitors.

The Defendant's Opposition To The Plaintiff's Application (Encl. 1)

[13] The defendant's oppose encl. 1 on three grounds:

(i) Whether the plaintiff should have filed this application under OS No. 24-1494-2011 in order to avoid confusion;

(ii) Whether ss. 32 and 43 of the Land Acquisition Act 1960 (LAA) is applicable for purposes of claiming late payment charges of 8% in view of the fact account that the compensation sum was already deposited into court;

(iii) Whether the plaintiff's application for a certificate under s. 33 of the GPA claiming interest on late payment charges and not compensation is appropriate. Hence, the plaintiff's application is unreasonable, merits no consideration and should be dismissed.

Summary Of The Defendants' Submission

[14] In summary, the defendants contend as follows:

(i) the plaintiff should have made this application under the originating summons' case number 24-1484-2011 since the plaintiff wanted to apply for payment to be made in accordance with the consent order in the case. Instead, the plaintiff filed a new originating summons under a new case number for the purpose of requesting payment for the consent order dated 25 November 2014;

(ii) the action of the plaintiff in filing the originating summons separately and not through the case number 24-1484-2011 may cause confusion to this Honourable Court and there is a likelihood of prejudicing the first and third defendants. This also may result in the occurrence of 'double counting' for the purpose of payment based on the consent order dated 25 November 2014;

(Note: This line of argument was withdrawn by the Defendants during the hearing on 27.6.2022).

(iii) the plaintiff's reliance on s. 32 and s. 43 of the GPA is misconceived. Based on the provisions of s. 32, the imposition of late payment charges seizes once payment has been deposited into court, In this regard, the defendants had deposited the sum of RM737,000 being the compensation sum into court as early as 15 September 2011.

(iv) under the terms of the consent order dated 25 November 2014, the amount owing by the defendants to the plaintiff consists of only two items:

(a) compensation in the sum of RM737,000; and

(b) late payment charges in the sum of RM757,595.62.

(v) the first defendant had made payment of both sums wherein the particulars of payment are as follows:

(a) on 21 June 2012: A sum of RM737,000 was deposited into court (the plaintiff received payment of the compensation on 14 July 2015);

(b) on 4 February 2016: A sum of RM281,065.67 was paid by the defendants into the plaintiff's bank account (this sum is part of the late payment charges of RM757,595.62);

(c) on 14 April 2021: A sum of RM476,529.65 being the balance of the late payment charges under the consent order dated 25 November 2014. This payment was made after the defendants received the plaintiff's present OS in which the plaintiff is claiming for a sum of RM699,164.74.

(vi) the plaintiff cannot at this juncture come to court to claim other sums which are not stated in the consent order as this amount to an attempt to vary the terms thereof. Any such attempt to do so should be struck out as once a judgment has been obtained regularly and perfected, the court is *functus officio* (see *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] 5 MLJ 1 and *Ann Joo Steel Bhd v. Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor And Another Appeal* [2019] 9 CLJ 153; [2020] 1 MLJ 698).

Courts Analysis

[15] In light of the fact that the defendants had withdrawn their first line of argument that the plaintiff should have made this application under the originating summons' case number 24-1484-2011 since the plaintiff wanted to apply for payment to be made in accordance with the consent order in the case, there are only two issues for me to deal with namely:

(i) Whether the plaintiff was wrong in relying on the provisions of s. 32 and s. 43 of the Government Proceedings Act 1956 when making this application? This is in view of the fact that when the first defendant made the calculation of late payment charges for the delay in compensation, the amount of RM737,000 was deposited to court. According to the defendants, whilst s. 32(1) of the Land Acquisition Act 1960 applies to this case, there is no late payment charges as the calculation date will stop when the compensation has been deposited in court.

(ii) Whether the plaintiff's application is an attempt to vary the terms of the consent order dated 25 November 2014?

A **First Issue**

[16] With reference to whether the plaintiff's application was filed under the correct legal provisions relied upon by the plaintiff, I find the defendants' contention on this point shallow for the following reasons.

B **[17]** In *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 3 CLJ 885, the High Court there set out the requirements for issuing a certificate under s. 33 GPA as follows:

(i) an order has been made by the court in favour of the applicant, which in this case was the plaintiff;

C (ii) the order is against the government or against an officer of the government.

[18] Under s. 2(1) GPA, the word "order" is defined as "a judgment, decree, rule, award or declaration."

D **[19]** In the present case before me, the plaintiff has shown that:

(i) that there is a perfected consent judgment between the plaintiff and the first defendant;

(ii) the orders were made against the first defendant who is an officer of Government and was executing the official duties at all material times; and

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(iii) there have been recent part payments reflecting the defendants' acknowledgment that further amounts are due and payable towards the judgment sum.

F **[20]** At the time the plaintiff filed the OS, the defendants had only paid part of the late payment charges of RM757,595.62. As the defendants had only paid a sum of RM281,065.67, there was still a balance of RM476,529.65 owing to the plaintiff. Taking into account, the late payment interest which had set in, the total amount outstanding became RM699,164.74.

G **[21]** On 21 June 2021, the defendants paid the balance of RM476,529.65 (being the remaining balance of the late payment interest) and considered the consent order satisfied and that the plaintiffs cannot claim any further sum as doing so would be contrary to the terms of the consent order.

H **[22]** Regrettably, I cannot agree with the defendants' contention that the plaintiff cannot claim late payment charges once the compensation sum is deposited in court and that the terms of the consent order prevent the plaintiff from doing so.

[23] My reading of s. 32 of the LAA finds that the plaintiff's entitlement I to late of payment charges is as of right and immediate for any compensation. In this regard, the case of *Ismail Bakar & Ors v. Director Of Lands And Mines, Kedah Darul Aman* [2010] 9 CLJ 810 ("*Ismail Bakar*") is directly on point.

[24] There, the respondent advised the appellant to make claims for late payment charges under s. 29A of the LAA. The Court of Appeal stated as the following: A

> [33] It is further argued by the respondent that the long delay does not invalidate the acquisition of the lands as the appellants would be entitled to interests for the late payments under s. 32 of the Act. With respect, we are also unable to accept this argument. There is not merit in it. In our view, *where the delay in making payment is grossly unreasonable, as has happened in the present case, where there has been a delay of nine years, it is no answer that the landowner is entitled to interests for the delay: what is of paramount importance to the landowner, who have been deprived of the use and enjoyment of his land, and what justice requires, is the right to compensation within a reasonable time.* Furthermore, s. 32 ought not to be interpreted as conferring on the respondent (or the Land Administrator) a 'license' to flout the stipulation of s. 29 with impunity. B C
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> [35] … *it is clear that under s. 32 there is an automatic right to be paid late payment charges as long as there has been a delay in making compensation payment by the Land Administrator. Under s. 32 there is no necessity for the appellants to make a claim for late payment charges. The entitlement to late payment charges is as of right and is immediate.* Therefore, it is wrong for the State Director, in his letters to the appellants, to advise the appellants to 'make a claim' for late payment charges. *As a matter of law the appellants need not have to make a claim in order to be paid the late payment charges. They should be paid forthwith the late payment charges together with the compensation sums.* Of course, now the appellants are no longer interested in the compensation and interest: they just want their lands back. (emphasis added) D E

[25] The case of *Ismail Bakar* (*supra*) was followed in *Arena Tegar Sdn Bhd v. Pentadbir Tanah Daerah Johor Bahru & Anor* [2017] 9 CLJ 77 wherein the court held that the plaintiff was automatically entitled to late payment charges at the rate of 8% per annum from the due date until the date payment was made. The *ratio* was as follows: F

> [23] The chief words in the aforementioned provision lie within the sentence "... the Land Administrator shall pay the amount awarded with late payment charges ..." *The word "shall" connote a statutory and obligatory duty. In other words, the provision imposes on the Land Administrator a statutory duty to pay not just the amount awarded, but also to pay the late payment charges* in the event either one of the two scenarios is applicable. G
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> [24] The first scenario is when the Land Administrator fails to pay the compensation award to the entitled person on or before the due date. The second scenario is when the Land Administrator fails to deposit the compensation award with the court on or before the due date. H
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> [25] The meaning of 'due date' is explained in s. 32(1C) of the Act which states as follows: I

A (1c) In this section "due date" in relation to any land means the date of taking possession of the land or a date three months after the service of a notice under section 16(1) in respect of the land, whichever is the earlier. (emphasis added)

[26] In this regard, I agree with the position taken by the plaintiff that B s. 32 of the LAA is wide to cover "any compensation" awarded under the LAA:

(1) When the amount of any compensation awarded under this Act in respect of any land is not paid or deposited on or before the due date, the Land Administrator shall pay the amount awarded with late payment C charges thereon at the rate of five per cent per annum from the due date until the time of such payment or deposit.

[27] Whilst the defendant is correct in stating that s. 32(c) of the LAA deems payment to be made "on the day of the delivery of the payment by the Land Administrator to the court" and that no late payment charges will D be imposed once it has been deposited in court, this provision does not apply to them.

[28] I conclude so as the defendants' have only made part payment from the judgment sum:

E (i) the late payment charges will be imposed as of right on the sum of RM476,529.95 and the balance judgment sum payable to the plaintiff; and

(ii) the defendants' admission in having outstanding judgment sum.

Second Issue

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[29] With reference to the second issue concerned, during the hearing on 27 June 2022, learned counsel Mr GK Ganesan for the plaintiff informed the court that his client has indeed received payment in the sum of RM476,529.95 after the OS was filed. Be that as it may, the payment was made late. Hence, the application before this court is still very much alive, G the only difference being that the sum being claimed as late payment charges by the plaintiff is now much lesser *ie*, RM151,836.80.

[30] Under this heading, the sums being claimed by the plaintiff is now:

(i) late payment charges; and

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(ii) interest on costs awarded under the consent order.

[31] In granting the above orders, I take the view that this court has the inherent jurisdiction to make such ancillary order as prayed for in order to give effect to the consent order.

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[32] Whilst it is settled law that once a court has pronounced a final order, it does not possess the authority to re-open, alter, amend and supplement the final order and judgment relating to the dispute it has adjudicated upon. This rule, known as the doctrine of *functus officio*, stems from the principle of finality in litigation. Nevertheless, as with all general rules, there are exceptions to the doctrine of *functus officio.*

[33] The Federal Court in *Stone World Sdn Bhd v. Engareh (M) Sdn Bhd* [2020] 9 CLJ 358; [2020] 12 MLJ 237 ("*Stone World*") has listed out certain limited and discrete situations where the court may make a further order subsequent to its previous sealed order, which include:

(i) an amendment of a previous order to reflect the original intention of the court which is evident from the previous and original order, or the body of the judgment of the original order;

(ii) a correction of a clerical error or a similar form of slip under the slip rule pursuant to O. 20 r. 11 of the Rules of Court 2012;

(iii) the clarification, supplementing of or amendment of a previous order so as to give effect to the original order under the 'liberty to apply' provisions; and

(iv) if there is provision in the Rules of Court 2012 to amend an original order so as to enlarge time specified.

[34] The Federal Court in *Stone World* (*supra*) further stated as follows:

> [19] Where is this jurisdiction to amend or supplement the original sealed order found? It is found in the inherent jurisdiction of the courts. *The superior courts possess a residual inherent jurisdiction to, inter alia, clarify the terms of an order and to make ancillary orders primarily to give effect to the decision or judgment handed down.* It is a necessary jurisdiction to enable a court to ensure that substantive justice between the parties is served, so as to give effect to its primary decision, through the dispensing of procedural justice.
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> [20] That *the court has the jurisdiction to dispense ancillary or supplemental orders to augment or substitute the original relief or remedy so as to give effect to the intent and purpose of its original decision* is not in doubt. The doctrine of *functus officio* does not encroach upon that jurisdiction. (emphasis added)

[35] In the case of *Phuah Beng Chooi & Ors v. Koh Heng Jin & Ors And Other Cases* [2006] 8 CLJ 364; [2007] 2 MLJ 458 ("*Phuah Beng Chooi*"), the High Court made certain consequential orders in order to give efficacy to the consent order.

[36] In the words of His Lordship Abdul Malik Ishak H (as he then was) in *Phuah Beng Chooi* (*supra*):

A I am acutely aware, that under inherent jurisdiction, this court can at any stage of the proceedings, even after judgement, vary modify or even extend its own order so as to express its intention and meaning correctly in order to ensure that the purposes of justice are not defeated (*Thynne v. Thynne* (1955) P 272, and *Pearlman (Veneers) SA (Pty) v. Bernhard Bartels* [1954] 1 WLR 1457, [1954] 3 All ER 659.)

B **[37]** In addition, O. 92 r. 4 of the Rules of Court 2012 provides as follows:

Inherent powers of the Court (O. 92, r. 4)

4. For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court
C to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[38] Given the fact that the defendants had dragged their feet in making payments which the plaintiffs are entitled to pursuant to the terms of the consent order, based on the authorities cited above, it is my considered view
D that this court has inherent jurisdiction to make ancillary order as prayed for by the plaintiffs.

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